UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

COMMUNITIES FOR EQUITY,
et al.,

Plaintiffs,

v.

MICHIGAN HIGH SCHOOL
ATHLETIC ASSOCIATION,

Defendant.
_____/

Case No. 1:98-CV-479

HON. RICHARD ALAN ENSLEN

OPINION

This matter is before the Court to consider whether Defendant Michigan High School Athletic Association's ("MHSAA") proposed Compliance Plan is a proper remedy.

Seven months ago, the Court found that the MHSAA's current schedule of high school sports seasons violates the rights of Michigan girls under the Fourteenth Amendment to the United States Constitution; Title IX; and Michigan's civil rights law, the Elliott-Larsen Civil Rights Act. *See Communities for Equity v. Michigan High Sch. Ath. Ass'n*, 178 F. Supp. 2d 805, 851, 857, 861 (W.D. Mich. 2001). Specifically, this Court found that basketball, volleyball, tennis, soccer, Lower Peninsula golf, and Lower Peninsula swimming and diving ("swimming") were scheduled for Michigan's female athletes in disadvantageous, usually non-traditional, seasons while their male counterparts were scheduled in advantageous seasons. *Id.* at 817-836.

The MHSAA was ordered to submit a Compliance Plan, proposing how it would bring its scheduling of high school sports into compliance with the law. Having considered the arguments advanced, the Court now opines:

I. The Court's Remedial Power

In *United States v. Virginia*, the United States Supreme Court determined that the exclusion of women from admission to the Virginia Military Institute ("VMI") was unconstitutional because it violated the Equal Protection Clause of the Fourteenth Amendment, just as this Court found the MHSAA's high school sports seasons violate the Equal Protection Clause, as well as two other statutory provisions. *See Virginia*, 518 U.S. 515, 534 (1996); *see also Communities for Equity*, 178 F. Supp. 2d at 851, 857, 861. The Supreme Court, in laying out the standard by which it would judge VMI's proposed remedy, said, "A remedial decree ... must closely fit the constitutional violation; it must be shaped to place persons unconstitutionally denied an opportunity or advantage in 'the position they would have occupied in the absence of [discrimination].'" *Id.* at 547 (quoting *Milliken v. Bradley*, 433 U.S. 267, 280 (1977)). The nature of the remedy is to be determined by the nature and scope of the violation. *Milliken*, 433 U.S. at 280.

The Supreme Court also noted that "[h]aving violated the Constitution's equal protection requirement, Virginia was obliged to show that its remedial proposal *directly addressed and related to the violation ...* ." *Virginia*, 518 U.S. at 547 (internal quotations and citations omitted) (emphasis added). In *Virginia*, the Supreme Court also stated that a proper remedy should "eliminate so far as possible the discriminatory effects of the past and bar like discrimination in the future." *Id.* (quoting *Louisiana v. United States*, 380 U.S. 145, 154 (1965) (courts have "not merely the power but the duty to render [such] a decree")).

"The scope of the district court's equitable powers to remedy past wrongs is broad, for breadth and flexibility are inherent in equitable remedies." *Milliken*, 433 U.S. at 281 (citing *Swan v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 16 (1971)). In addition, "the federal courts in devising a

remedy must take into account the interests of state and local authorities in managing their own affairs, consistent with the Constitution." *Id.* at 280-81.

Therefore, this Court ordered the MHSAA to cure its violations of the Constitution's Equal Protection Clause, Title IX, and Michigan's Elliott-Larsen Civil Rights Act. The MHSAA was to design a remedy of new sports seasons where female and male high school athletes would "share the advantages and disadvantages of the new seasons equitably." *Communities for Equity,* 178 F. Supp. 2d at 862.

Courts cannot require more of school officials in designing educational programs than their obligations under the law impose. *See Board of Educ. of Hendrick Hudson Central Sch. Dist. v. Rowley,* 458 U.S. 176, 206-207 (1982). Notwithstanding *Rowley*, this Court must require the MHSAA to rectify all constitutional and statutory violations identified by the Court.

In devising a remedy to redress the violations of the MHSAA's current sports schedule, the Sixth Circuit instructs courts to "impose the least intrusive remedy available." *See Kendrick v. Bland,* 740 F.2d 432, 438 (6th Cir. 1984) (concerning district court remedies of constitutional violations found in state prisons). "In the event that the state fails to avail itself of the deferential opportunity to correct its constitutional defects with minimal federal intrusion, the federal court may implement a more intrusive remedy[.]" *Id.* at 439.

My duty today in approving a Compliance Plan for new sports seasons is to restore gender equity to a scheduling system where females have suffered discrimination in the placement of six of their sports seasons. *Cf. Milliken,* 433 U.S. at 281 n.15 (discussing a plan to provide compensatory and remedial education to schoolchildren subject to unlawful racial segregation). I am not unmindful of the central educational function of schools and their sporting programs, at the same time acknowledging the practical and legal limits of this Court's remedial powers. *Cf. id.* "Since the

ultimate objective of the remedy is to make whole the victims of unlawful conduct, federal courts are authorized to implement plans that promise 'realistically to work now.'" *Id.*[1]

II. Defendant MHSAA's Proposed Compliance Plan

The MHSAA proposes reversing the seasons of Lower Peninsula girls' golf, swimming, and tennis with the boys' seasons in those sports. In the Upper Peninsula, the MHSAA proposes moving girls' golf and tennis to advantageous seasons, while moving boys' swimming and tennis to disadvantageous seasons. This leaves girls throughout the state in disadvantageous seasons in basketball, volleyball, and soccer.

III. Analysis of Defendant MHSAA's Measure of Equity

Plaintiffs assert that the MHSAA's proposed Compliance Plan fails to achieve gender equity. This is because Plaintiffs assert that counting the number of seasons in which males and females are respectively disadvantaged and coming up with the same number is not a sufficient measure of equity. Due to the number of participants in each of the sports at issue in this lawsuit and total number of female and male participants in Michigan high schools' sports programs, the MHSAA's plan leaves a much greater total number of female athletes and a much greater percentage of female athletes in disadvantageous seasons than their male counterparts. In addition, Plaintiffs assert that the sports

[1] The MHSAA cites to a 1936 Sixth Circuit Court of Appeals case for the proposition that "[e]quity will guard against oppression even while exercising a salutary equitable power. It will not apply a remedy worse than the ills it seeks to cure. It will always seek to strike a balance of convenience as between litigants." *Wheeling Steel Corp. v. American Rolling Mill Co.*, 82 F.2d 97, 100 (6th Cir. 1936). This case involved a discovery dispute between litigants in the early stages of a lawsuit, at a time when the Sixth Circuit turned to equity considerations to resolve the dispute (instead of turning to the Federal Rules of Civil Procedure which were born two years later, as the Sixth Circuit would do today). *Cf. id.* at 98-99. Nonetheless, this Court obviously strives to remedy the MHSAA's constitutional and statutory violations by requiring that the MHSAA adopt any one of a range of equitable solutions.

chosen by the MHSAA to switch seasons in the Compliance Plan are offered by the fewest number of member schools.

In the 2001-02 school year, 20,800 girls across the state played basketball, 3,800 girls played golf, 12,800 girls played soccer, 6,600 girls swam, 8,900 girls played tennis, and 21,500 girls played volleyball.[2] (*See* 2001-02 Participation Numbers, Plaintiffs' Plan Hrg. Ex. 10.[3]) In all sports, there were 118,500 female participants. (*Id.*[4]) In the same year, 8,300 boys played golf, 13,700 boys played soccer, 4,400 boys swam, and 8,000 played tennis. (*Id.*) In all sports, there were 168,600 male participants. (*Id.*) Extrapolating the MHSAA's proposed Plan for the Lower Peninsula across the entire state, for example, a total of 55,100 girls (those playing basketball, volleyball, and soccer) would remain in disadvantageous seasons, while a total of 20,700 boys (those participating in golf, swimming, and tennis) would move to disadvantageous seasons.[5] Thus, 46.5 percent of female participants would continue to play in disadvantageous seasons, whereas 12.3 percent of male participants would switch to disadvantageous seasons.

Similarly, the United States asserts that the MHSAA's proposed Compliance Plan does not achieve gender equity for many of the reasons stated by Plaintiffs. In addition, the United States

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[2] The Court realizes that with respect to both boys and girls, participant numbers will often count the same individual more than once. For instance, many students play more than one sport, and some students play none at all. A student playing both basketball and volleyball would be counted in the participants of both sports. However, for purposes of this analysis, this fact is of no relevance. Every participation "slot" counts as an individual enjoying the benefits or burdens of an advantageous or disadvantageous season. Thus, a female student playing both basketball and volleyball currently would be subject to unlawful discrimination twice, during each season.

[3] The participation numbers are rounded off to the nearest hundred.

[4] The total participation number for females does not include competitive cheer.

[5] Extrapolating the Lower Peninsula plan across the entire state makes the most sense for consideration purposes, since the Lower Peninsula is home to the majority of the state's population. The Court was not provided with a tally of participation numbers divided by peninsula.

asserts that the proposed Plan fails to address the greatest qualitative harms as identified in this Court's Opinion. In other words, the sports selected for schedule change involved those with the least substantial harms found, in terms of both quality and quantity of those harms.

In its response, the MHSAA asserts that using participation numbers to measure gender equity in the proposed Plan is not proper because such a measure would result in a requirement that the Plan achieve "gender parity," which is not required by Title IX. The MHSAA also asserts that the large number of participants in boys' football will inevitably skew any assessment made which uses the number of participants to judge equity. The MHSAA also objects to Plaintiffs' failure to include female participants in competitive cheer in the total number of female sports participants in Michigan.

The Michigan Interscholastic Athletic Administrators Association ("MIAAA"), in writing an *amicus curiae* brief, asserts that the MHSAA's proposed Compliance Plan should be approved largely for the same reason the MHSAA advances, *i.e.*, the proposed Plan results in an equal number of disadvantageous seasons borne by both girls and boys. The MIAAA apparently asserts that other remedies might result in "[t]he dilution of quality in the name of equality ... ." (*See* Amicus Curiae Brief of the MIAAA, Dkt. No. 583, at 5.)

Contrary to the MHSAA's assertion, using numbers to measure the gender equity in its proposed Plan does not amount to a requirement of achieving "gender parity." The MHSAA is correct that Title IX requires "equality of athletic opportunity," not "gender balance." *See Horner v. Kentucky High Sch. Ath. Ass'n*, 206 F.3d 685, 697 (6th Cir. 2000) (*Horner II*). Therefore, Title IX requires that students are provided with sporting opportunities which "effectively accommodate the interests of both sexes in both the selection of the sports and the levels of competition, *to the extent necessary to provide equal athletic opportunity*." *Id.* at 694 (emphasis added in *Horner II*).

However, *Horner* involved a claim that female athletes would be disproportionately denied sports opportunities by the Kentucky High School Athletic Association's facially neutral rule requiring that 25 percent of its member schools indicate a willingness to sponsor a new sport before that sport would be sanctioned. *See Horner v. Kentucky High Sch. Ath. Ass'n*, 43 F.3d 265, 269 (6th Cir. 1994) (*Horner I*). The *Horner* plaintiffs offered no evidence that the level of female interest in fast-pitch softball was not being met by permitting females to play on male teams. *Horner II*, 206 F.3d at 696. The *Horner II* Court held that because Title IX requires only "equality of athletic opportunity," the *Horner* plaintiffs could not succeed by showing *only* that male fast-pitch softball was sanctioned while female fast-pitch softball was not. *Id.* at 697.

The difference, of course, is that this Court has already found Michigan girls are denied "equality of athletic opportunity" as compared to the opportunities offered boys by the MHSAA's scheduling practices. If the MHSAA chooses not to place all male and female sports teams into the same season, there has to be some way of measuring whether equity between the sexes has been achieved, *i.e.*, whether females are denied "equality of athletic opportunity" by playing sports in disproportionately disadvantageous seasons. The MHSAA asserts that counting the number of advantageous and disadvantageous seasons in which each sex plays is enough of a measure of equity.

Moreover, the MHSAA asserts that any picture involving numbers of participants is skewed because of the large numbers of participation in boys' football. For example, in 2001-02, 44,411 boys played football, which was almost twice the next largest boys' sport of basketball and was twice the largest girls' sport of volleyball. (*See* 2001-02 Participation Numbers, Plaintiffs' Plan Hrg. Ex. 10.) This, however, does not mean that a measure of equity should not include a measure of participants in various advantageous seasons. For one, boys' football is typically permitted to cut no or only a few students after try-outs, where other boys' and girls' sports are typically not permitted this luxury, which

might account, in part at least, for football's large participant numbers. It would not be equitable to deny a much larger percentage of female athletes the ability to play in an advantageous season merely because football is afforded this luxury. In addition, the large number of boys playing football represents a large number of boys who are able to play in an advantageous season. Equity requires that an equally large number of girls have the opportunity to play in an advantageous season.

Under the MHSAA's proposed standard of determining equity, strictly by counting seasons, in theory three new fledgling boys' sports could be added and placed in disadvantageous seasons when three new fledgling girls' sports are added and placed in advantageous seasons. At that point, boys would have three more disadvantageous seasons than girls. Thus, the three seasons the MHSAA has proposed moving in the Lower Peninsula – golf, swimming, and tennis – could be moved back to their original positions. That situation would qualify as an "equitable" scheduling arrangement under the MHSAA's measure of equity. Calling that situation "equitable," however, would fool very few people. It would also do violence to the word "equitable" precisely because it would leave unaffected the bulk of the disadvantaged female athletes.

In addition, I am also concerned about the proposed movement of only female individual sports as opposed to female "team" sports, those where individual performance is subsumed by the importance of the group's collective performance. For example, individual sports tend to include fewer participants. Also, team sports offer opportunity for interplay and cooperative play which are at the heart of the educational aspirations of high school athletics.

Therefore, it seems inevitable that some measure of participants and harms must factor into an equity equation. A measure of equity must contain some measure of the percentage of participants left playing in a disadvantageous season, but should count competitive cheer participants in the total number of female participants. The measure of percentage of participants, the relative qualitative

harms identified in this Court's Findings of Fact, and the number and type ("team" or individual performance) of sports left in disadvantageous seasons must present a total picture of equity between the sexes.

IV. Analysis of Defendant MHSAA's Options in Achieving Equity

The MHSAA remains diametrically opposed to switching girls' basketball with girls' volleyball, placing girls' volleyball in the fall and girls' basketball into the winter with boys' basketball. Upon now being presented with the number of participants in the various affected sports, however, it is clear to this Court that the MHSAA's position on this issue is untenable if gender equity is to be achieved. Even assuming it to be feasible to switch all of the other girls' sports currently in disadvantageous seasons in the Lower Peninsula – golf, swimming, soccer, and tennis – into advantageous seasons, while moving boys in those sports into disadvantageous seasons, approximately 42,300 girls would still remain in disadvantageous seasons in basketball and volleyball, representing 35.7 percent of female participants, whereas 34,400 boys would be in disadvantageous seasons, representing 20.4 percent of male participants. (*See* 2001-02 Participation Numbers, Plaintiffs' Plan Hrg. Ex. 10.)

Therefore, it is simply impossible for any plan to achieve equity without switching the girls' basketball and volleyball seasons with each other. This conclusion also seems particularly warranted considering the qualitative harms found to exist when those two sports are scheduled as they currently are scheduled.

The Court regrets not formulating a test for measuring equity earlier because that has allowed greater delay in formulating a remedy which will result in compliance with the law. However, the Court was not aware prior to its consideration of the actual Plan at issue now that the participation numbers of girls' basketball and volleyball were so much greater than the other sports.

In addition, the MHSAA has received a delay in the briefing schedule from the Sixth Circuit Court of Appeals in its appeal of this Court's ruling on liability while this Court finishes the process of ordering a remedy. This Court has a duty to order a proper remedy that can be implemented as soon as possible. This cannot happen as long as the appeal is stalled. In the interest of moving this forward, the Court will order the MHSAA to place girls' basketball and volleyball in their respective advantageous seasons, *i.e.*, girls' basketball in the winter season and girls' volleyball in the fall season ("reversing girls' basketball and volleyball"), because no equitable plan can be formulated without this change.

After that, if the MHSAA wishes to keep separate seasons for the sexes in the rest of the sports at issue, it must reverse two girls' seasons with two boys' seasons in the Lower Peninsula in the remaining four seasons at issue in this case – golf, soccer, swimming, and tennis. In the Upper Peninsula, the MHSAA must reverse one girls' season with one boys' season in the two remaining seasons at issue – soccer and tennis – if combined seasons are kept in swimming and golf. If these combined seasons are not kept in the Upper Peninsula, two of the four seasons must be reversed, just as in the Lower Peninsula. When the number of participants in competitive cheer is included in the total number of female sports participants in Michigan, these reversals in the remaining sports should result in a roughly equitable new schedule under the Court's formula enunciated *supra*. This remedy will be in the form of an injunctive order which can be reviewed immediately by the Circuit and will prevent further stalling while the MHSAA chooses the remaining seasons to switch.

The Court is aware that to the extent possible, it must permit the MHSAA to design the new seasons. However, the Court may also order a certain portion of a remedy, as it is doing today, or an entire remedy, where there exists only one remedy which would result in remediation of the unconstitutional and unlawful violations. *Cf., e.g., Virginia*, 518 U.S. at 547-558 (VMI ordered to

admit women when its proposed remedy to the constitutional violation was rejected as not achieving equity, and when admission of women at VMI seen as *only* available option to achieve equity).

This order is well within practical and legal limits. *See Milliken*, 433 U.S. at 281 n.15. Moreover, under the facts, this order is legally required. Finally, the Court believes this result to be the result *most closely mirroring* what would have been in the absence of unlawful discrimination.

The brief submitted by the MIAAA did little to convince this Court that the MHSAA's proposed Plan was motivated by anything but an attempt to stay as close to the status quo as possible. Even though the MIAAA suggested that achieving equality in scheduling will "dilut[e] ... quality," the MIAAA has presented the Court with no additional information to suggest that its members will not be able to provide quality athletic programs for both sexes under an equitable schedule which is compliant with the law. Gender equity is not a punishment, but a vital part of the rights underpinning this Nation and the State of Michigan, and it will not harm high school athletic programs unless that result becomes a self-fulfilling prophecy.

For example, in Kentucky (one of Michigan's sister states in the Sixth Circuit) males and females already play high school basketball in the winter season together. Being different from almost all of the rest of the country does not necessarily indicate that Michigan is an innovator, and given this Court's findings in December 2001, it indicates that Michigan is lagging behind almost all other states.

V. Conclusion

The MHSAA's proposed Compliance Plan is therefore rejected as not achieving equity. The MHSAA may either: (1) combine all sports seasons so both sexes' teams play in the same season ("combine seasons"), and move girls' volleyball to its advantageous season of fall; or (2) reverse girls' basketball and volleyball; and in the Lower Peninsula, reverse two girls' seasons with two boys' seasons from among golf, tennis, swimming, and soccer; and in the Upper Peninsula, keep combined

seasons in golf and swimming and reverse seasons in either tennis or soccer; or otherwise treat the Upper Peninsula the same as the Lower Peninsula; or (3) reverse girls' basketball and volleyball; and in both peninsulas, combine seasons in two sports, and reverse seasons in one of the two remaining sports at issue.

The MHSAA should notify this Court which of these options it has chosen, and the particular placement of seasons under that option, by 90 days from the date of this Opinion and Injunctive Order, which is **WEDNESDAY, OCTOBER 30, 2002**. These 90 days will permit the MHSAA to consult with its member schools during the school year, which begins in less than one month. Finally, the Court will order the MHSAA to implement this new Plan in the first academic year following the lapse of the current stay issued by the Sixth Circuit.

/s/ Richard Alan Enslen
RICHARD ALAN ENSLEN
United States District Judge

DATED in Kalamazoo, MI:
August 1, 2002

UNITED STATES DISTRICT COURT
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Case No. 1:98-CV-479

HON. RICHARD ALAN ENSLEN

INJUNCTIVE ORDER

In accordance with an Opinion filed this day,

IT IS HEREBY ORDERED that Defendant MHSAA's Compliance Plan (Dkt. No. 559) is **REJECTED**.

IT IS FURTHER ORDERED that the MHSAA file written notice of its amended Plan with the Court Clerk on or before **WEDNESDAY, OCTOBER 30, 2002**.

IT IS FURTHER ORDERED that the MHSAA shall implement its amended Plan so as to apply to the first academic year following the lapse of the stay of the Sixth Circuit Court of Appeals.

/s/ Richard Alan Enslen
RICHARD ALAN ENSLEN
United States District Judge

DATED in Kalamazoo, MI:
August 1, 2002